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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JARROD NEIL CROSS et al., Defendants and Appellants.	G054153 (Super. Ct. No. 16NF0658) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed in part and reversed in part.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant, Jarrod Neil Cross.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant, Saquila Collette Osborne.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Arlene A. Sevidal, Andrew Mestman, and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

In this case, a pimp, Jarrod Neil Cross, and a prostitute, Saquila Collette Osborne, were convicted of trafficking, robbing, assaulting, and kidnapping to rob another prostitute, Kia M. (Kia). But Osborne was not only a defendant, she was also a victim. Cross was also convicted of pimping and pandering Osborne.

Osborne argues she received ineffective assistance of counsel and the prosecutor committed prejudicial error. Relying on Penal Code section 654, Cross contends the trial court erred when it imposed consecutive sentences on the robbery conviction (count 2) because it was part of a continuous course of conduct with the human trafficking conviction. Osborne and Cross join in the other's arguments, but their joinders are inapplicable here.[1]

As we explain below, we agree Osborne's trial counsel was ineffective when he failed to file a Penal Code section 995 motion, and thus we need not address her contention the prosecutor committed prejudicial error. We reverse Osborne's convictions for human trafficking, robbery, and kidnapping for robbery. We affirm her conviction for assault with great bodily injury. Cross's claim has no merit, and we affirm his judgment.

FACTS

I. Substantive Facts

In August 2015, Kia came to Orange County to work as a prostitute. Kia met Osborne, aka "Millie," on Harbor Boulevard while Osborne was working as a prostitute. The first time they met, Osborne told Kia that Cross, aka "Rosay," was her pimp and he "beats on her." Cross and Osborne had a room at the same motel where Kia was staying. Osborne told Kia that she wanted her to be one of Cross's prostitutes. Kia replied she could not because she had a pimp, but he was in jail.

One day, Kia saw Osborne sitting on the curb crying. Osborne asked Kia for a cigarette. Kia said she did not have any, but she could get some. Kia invited

[1] *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363 [circumstances where particular claim does not apply to all defendants].

Osborne to her motel room, and Osborne smoked a cigarette. Osborne asked Kia to come to her motel room, but Kia refused. Osborne got her possessions from her room and returned to Kia's room upstairs. Cross went upstairs to Kia's room and found Kia and Osborne getting ready to work. Kia smoked marijuana with Cross and Osborne. Kia and Osborne went to Harbor Boulevard, but Kia started to feel sick and returned to her room.

Two days later, Kia saw Osborne on Beach Boulevard and they returned to the motel. Osborne invited Kia to her room to smoke marijuana and told her that Cross was not there. When they got to the room, Osborne went into the bathroom and closed the door.

Cross, who was in bed, got up and asked Kia if she had money. Kia said she did not have any money, and Cross said she was lying. Kia repeated she did not have any money and tried to go to her room. Cross grabbed her cell phone from her hand. Cross rubbed his hands on Kia's arms, and she told him to stop. Osborne left the bathroom, grabbed a bag, and returned to the bathroom. Kia kept trying to move away from Cross, but he would not let her. When Kia said she was going to her room and moved towards the door, Cross told her that she could not leave and she was breaking the rules. Cross asked her for money, and she refused. Osborne left the bathroom and told Cross that she knew Kia had money. After Cross told Kia to not lie, he elbowed her face. He took off her boot and took the money from inside her boot.

Cross put Kia in the bathroom and told her not to do anything stupid; it was about 7:00 a.m. She was in the bathroom for a few hours. Kia heard her cell phone ringing, but Cross would not give her the phone. Cross agreed to let Kia call her mother and daughter. When Kia spoke with her daughter and began to cry, Cross grabbed the phone and left Kia in the bathroom. At some point, Osborne went to Kia's room and moved all of her belongings to their room.

Kia stayed in the bathroom until Osborne had to use the restroom. Kia asked Osborne to help her, but Osborne told her that she was on her own. Kia asked

Osborne if she could go to work with her, but she said it was up to Cross. Cross wanted Kia to prostitute for them because he needed money—he had just gotten out of jail and his car was taken. When Osborne was in the bathroom, Cross touched Kia's breasts and buttocks and said he wanted to have sex, but Kia refused.

After Osborne went to work, Cross tried to speak with Kia, but she was crying. Cross told her that he wanted her to make money for him and he would let her go when she did. When Kia said she did not believe him, Cross said that was her "'only way out.'" On his cell phone, Cross made a recording of him telling her that he was going to let her leave, and "that everything was by choice, not by force." When she tried to walk to the door, he turned the camera off and said, "'Bitch, you really thought I was going to let you walk out this door?'" Cross shut the door, told her to stop crying, and asked her if she remembered him; eventually Kia realized she knew him from high school. Later, while Kia was taking a shower, he pulled back the shower curtain; Kia thought he was recording her with his cell phone.

Kia and Cross remained in the room all night, while Osborne was out working. At some point, Kia fell asleep on the floor and when she woke up the next morning, she heard Cross and Osborne fighting. Osborne was upset because she had to work as a prostitute, but Kia did not. Cross said he would have Kia work for him when he trusted her. Cross punched Osborne in the face. Osborne blamed Kia for her fight with Cross. Osborne punched Kia in the eye. Osborne grabbed Kia by the hair, slammed her to the ground, and kicked her while Cross watched. Cross and Osborne calmed down and Kia sat quietly in the corner.

When it was time to check out, Cross, Osborne, and Kia moved into another room on the second floor. Osborne walked in front of Kia while Cross walked behind her. He told Kia to look down and walk straight to the room because there were cameras filming the hallways. Once in the second room, Kia slept all day; she was not allowed to leave. When Cross left the room a couple times, Osborne watched Kia. Kia

did not try to escape because Cross was big and intimidating and he threatened her; she hoped he would get comfortable with her and she would try to escape.

When Cross returned to the room, he demanded money from Kia. Kia told him that she had money in her bank account. Kia said she did not have her bank card and to withdraw money she needed her identification, which was in the motel office. Cross sent Osborne to get it but the motel employee told Osborne they did not have it. The three stayed in the motel room the entire night. Cross told Kia that she was not allowed to leave.

The next day, Cross sent Osborne and Kia to the motel office to obtain Kia's identification. While Osborne was talking with the manager, Kia wrote down her name, social security number, and birthdate and showed it to the clerk, hoping the clerk would realize she needed help, but the clerk said nothing. Osborne and Kia returned to the motel room. Osborne told Cross that she could not get Kia's identification, and the two of them left the room.

Kia stayed in the room for a couple of minutes and walked outside. She did not see Cross or Osborne, but she walked back into the room because she was unsure what to do. After she determined her friend's room number and called to make sure she was there, Kia went to her friend's room and told her what had happened.[2] The friend's boyfriend arrived and learned what had happened. When the boyfriend opened the door, they heard Cross yelling, and Kia hid in the bathroom. The friend called the motel office, and the police responded to the friend's room. When officers arrested him, Cross had two cell phones and $398.

California Highway Patrol (CHP) investigator Nate Logan, who was assigned to the Orange County Human Trafficking Task Force (Task Force), spoke with Kia at the motel that day and several times afterward. Kia initially denied working as a

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[2] Video surveillance generally confirmed the parties' movements.

prostitute, but eventually admitted it. Kia told Logan that Cross and Osborne held her against her will for three days, demanded her money, and beat her. She told him that Cross was Osborne's pimp, and Cross wanted her to work for him.

II. Procedural Facts

In case No. 15NF2278, a felony complaint charged Cross and Osborne with the following offenses regarding Jane Doe (Kia): human trafficking (Pen. Code, § 236.1, subd. (b), all further statutory references are to the Penal Code, unless otherwise indicated); kidnapping (§ 207, subd. (a)); first degree robbery (§§ 211, 212.5, subd. (a)); and assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)). The complaint also charged Cross with the following offenses concerning Jane Doe No. 2 (Osborne): pimping (§ 266h, subd. (a)); and pandering (§ 266i, subd. (a)). The complaint alleged Cross suffered three prior prison terms (§ 667.5, subd. (b)). From the outset, attorney Gilbert Paul Carreon represented Osborne.

At the conclusion of the preliminary hearing, the magistrate, Commissioner Ronald E. Klar, held Cross and Osborne to answer on all counts. The court's minute order indicates that on October 27, 2015, the prosecution filed an information similar to the complaint.

On the date set for trial, March 1, 2016, the prosecutor and the Orange County Alternate Defender, who represented Cross and was specially appearing for Carreon, appeared. The prosecutor represented to the trial court that Carreon was in trial. The court stated the case was set for jury trial that day and asked for the prosecutor's readiness status. The prosecutor stated the following: "At this time the People are announcing, today is date certain, and People are announcing we are unable to proceed." The prosecutor indicated he was refiling the charges that day. Pursuant to section 1382, the court dismissed the case based on the prosecutor's representation he was unable to proceed.

The same day, in case No. 16NF0658, the prosecution filed a felony complaint. The complaint charged Cross and Osborne with the following offenses regarding Jane Doe (Kia): human trafficking (§ 236.1, subd. (b), count 1); kidnapping (§ 207, subd. (a), count 2); first degree robbery (§§ 211, 212.5, subd. (a), count 3); assault with force likely to produce great bodily injury (§ 245, subd. (a)(4), count 4); and kidnapping to commit robbery (§ 209, subd. (b), count 7). The complaint also charged Cross with the following offenses concerning Jane Doe No. 2 (Osborne): pimping (§ 266h, subd. (a), count 5); and pandering (§ 266i, subd. (a), count 6). The complaint alleged Cross suffered three prior prison terms (§ 667.5, subd. (b)).

At the preliminary hearing again before magistrate Klar, which we will discuss in greater detail below, Kia and Logan testified. At the conclusion of the preliminary hearing, the magistrate held Osborne, who was represented by Carreon, to answer only on count 4. The magistrate held Cross to answer on all the counts except count 4.

An amended information charged Cross and Osborne with committing the following offenses against Kia: human trafficking (§ 236.1, subd. (b), count 1), first degree robbery (§§ 211, 212.5, subd. (a), count 2), assault with force likely to produce great bodily injury (§ 245, subd. (a)(4), count 3), and kidnapping to commit robbery (§ 209, subd. (b), count 6). It also charged Cross with committing the following offenses against Osborne: pimping (§ 266h, subd. (a), count 4), and pandering (§ 266i, subd. (a), count 5). It also alleged Cross suffered three prior prison terms (§ 667.5, subd. (b)).

Despite the fact the magistrate held Osborne to answer only on count 4, her trial counsel did not file a section 995 motion.

At trial,[3] Kia was not present. A video recording of her preliminary hearing testimony was played for the jury.

Kia's friend from the motel testified that when Kia came to her room she had a black eye. Photographs of Kia's injuries were shown to the jury. She recognized Cross and Osborne and had seen them together. She stated that a few days before the incident, she saw Cross chasing Osborne and dragging her back to their room. The friend heard Osborne say the following: "'I'm not going to put up with this shit anymore. You're not going to fucking put your hands on me.'"

Two videos found on Cross's cell phone were played for the jury. In one video, Cross told Kia the door was open and she could leave, and he had not touched her belongings. Kia said that was not all of her stuff. When Cross asked if she was leaving, Kia asked, "You are not gonna [*sic*] touch me, not gonna [*sic*] hit me[.]" Kia agreed he had not touched her, but she wanted to make sure nothing would happen to her. Kia later asked, "[S]o that stays here?" Cross asked if she wanted to go and told her to stop asking questions. In another video, Cross recorded Kia while she was showering. Cross and Kia are seen talking and joking with each other.

On Cross's cell phone, police also found a series of text messages between Cross and Osborne that were consistent with a pimp/prostitute relationship. On Cross's laptop computer, police found photographs for prostitution related advertisements, some featuring Osborne. They also found a Facebook profile under the name "Rosay Babbii."

Detective Luis Barragan, who was assigned to the Task Force, testified concerning the culture and customs of pimping and prostitution, and commonly used

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[3] Trial in this case was during the summer of 2016. About the time the trial ended, the Legislature enacted section 236.23, which offered human trafficking victims an affirmative defense to certain crimes they were coerced into committing. Section 236.23 was effective January 1, 2017.

slang terms.[4] As relevant here, Barragan stated pimps use violence to control a prostitute. He explained one method to "break" a prostitute is to take her money to force her to follow the pimp's demands. Barragan opined "the pimp has the control of the relationship." Additionally, Barragan testified that about a year before the incident here, he saw Osborne and two other prostitutes, including Jazelle Bess, near Harbor Boulevard identifying single male motorists. Officers arrested the women. Cross was in a vehicle nearby. When a patrol unit arrived, Cross fled at an excessive speed, and an officer in a patrol unit stopped his car and searched it. Inside his car, an officer found women's clothing and a bag containing California identification for four different women, including Osborne.

Bess testified she was with Cross and Osborne when officers arrested her. Bess stated she and Osborne were prostituting on Harbor Boulevard, and Cross was there as Osborne's pimp. Bess knew Cross was a pimp because when Osborne was not around, Cross asked if she would work for him. Bess ignored him. Bess went to Harbor Boulevard every weekend and often saw Cross and Osborne. Bess stated that when Osborne was there, Cross was usually sitting in his car where he could watch Osborne.

After counsel presented closing arguments, the trial court instructed the jury, including on the defense of duress (CALCRIM No. 3402). A jury found Cross and Osborne guilty of all counts.

After Cross admitted the prior prison term allegations, the trial court sentenced Cross to six years on count 2 and one year and four months on count 4 for a total determinate prison term of seven years and four months. The court imposed a consecutive indeterminate term of life with the possibility of parole on count 6. The

[4] We do not provide the entirety of the testimony regarding the customs and terminology of pimping and prostituting because it is unnecessary for resolution of the issues on appeal.

court imposed and stayed sentences on counts 1, 3, and 5 (§ 654), and stayed for purposes of sentencing the punishment for the three prior prison terms.

The trial court sentenced Osborne to prison for six years on count 2 and life with the possibility of parole to run concurrently on count 6. The court imposed and stayed sentences on counts 1 and 3 (§ 654).

DISCUSSION

I. Ineffective Assistance of Counsel

Osborne argues she received ineffective assistance of counsel when her trial counsel did not file a section 995 motion. We agree.

A. Background

At a preliminary hearing in case No. 16NF0658 before Commissioner Klar, Kia testified concerning the events detailed above.

Logan, the CHP investigator, testified that based on his training and experience a "'bottom bitch'" is a prostitute who works under the control of a pimp or trafficker by recruiting other prostitutes, collecting proceeds from prostitutes, supervising prostitutes, and punishing prostitutes. He added a "'Wifey'" is another prostitute who works under the same pimp. He stated pimps expect prostitutes to recruit other "Wifeys" to work for the pimp. During the course of his investigation of this case, Logan learned there was evidence demonstrating Cross and Osborne had a pimp-prostitute relationship for about one year. The prosecution rested and requested the magistrate hold Cross and Osborne to answer on all counts.

The magistrate stated that after previously holding Cross and Osborne to answer on all counts in case No. 15NF2278, the magistrate, within days of his decision, questioned his decision and now, after the prosecution refiled the case and it was fortuitously assigned to him, wanted to discuss his concerns.[5]

[5] The trial court previously dismissed the case on the date set for trial based on the prosecutor's representation he was unable to proceed.

After briefly discussing count 4, the magistrate stated the following: "Not to mention all of the other stuff we're going to discuss in a few minutes about her being a victim. I am going to make that absolutely clear here, if nobody else does. That she is a victim of human trafficking, in my opinion, worse -- [10] times worse than this victim that testified. That's a factual finding that I am going to make, that I am clear in my mind that this evidence demonstrates. She is an absolute victim." The prosecutor asserted the evidence demonstrated Osborne aided and abetted the offenses. The magistrate stated as follows: "I am going to parse this out because it's been bugging me for months, obviously, and now I have got it in my hands and I am going to do something about it. [¶] You have got a human trafficking victim for an entire year apparently, [Osborne], under duress, under coercion, under violence that's absolutely inflicted in this case on her. [¶] How do you then say that she is part and parcel voluntarily committing a robbery, a [section] 245, or anything else? And this recruiting stuff that this expert talks about, great, they recruit, but they're expected by the pimp to do that so they're still under the control and the guide of this bad dude, this bad person, and yet on the other side of your mouth, she is liable for the criminal conduct she does because of that duress or coercion. I can't get there."

The prosecutor contended there was insufficient evidence Osborne acted under duress. The magistrate stated the following: "I understand there [are] some things that are left for a jury and I understand the standard I am dealing with here, so I understand sometimes a jury has to decide issues unless, as a matter of law, I can say there is duress, coercion or violence or as a matter of law in self-defense cases. I don't have to leave it to a jury, even as a magistrate, if it's -- there is no contradiction in terms. [¶] If, as a matter of law, self-defense exists, there is nothing to go up to the trial or a jury trial. [¶] I can make those calls. It's rare." After the prosecutor agreed, the magistrate added the following: "And I read the statute and I read the duress and then I read the duress instruction, [CALCRIM No.] 3402, I just

happened to pull that up, and I read everything and just being part of the process, being a human trafficking victim for a solid year apparently, of course, she is part of the process. [¶] So, I don't know how you can just throw out "'part of the process, she is guilty.'" That means every human trafficking victim that takes money off of someone at the direction of her pimp is guilty of robbery and that's not true."

The prosecutor agreed if there was evidence she did that under duress, and the court responded the following: "And that's the evidence I saw. I saw -- you even brought it up. The year -- the year of being involved with this person, the violence that was inflicted that was evidenced by the victim was severe violence, the statements she made to the victim about having a pimp and 'he has beaten me in the past' and it's clear there is a relationship of money being given back to him and he is controlling her and they have arguments and he even beat her because of what the victim wasn't doing or wasn't going to do. So I don't know how you can say there wasn't that kind of violence, duress or coercion."

The prosecutor asserted there was not just evidence of the assault and the recruiting, there was also evidence that when Cross left the room, Osborne guarded Kia. The court replied the following: "See, I agree with your facts. See, I am not disagreeing with what you're saying. What I am saying is the basis of that contact is what? Would she have done that conduct without the male in the picture at all?" The prosecutor repeated evidence of duress was not present. The court responded the following: "You seem to be minimizing their relationship as a violent human trafficking situation or duressful situation or coercive situation because all the other cases are the same. They prostitute. They beat her once in a while here and there and she gives money to him every time she returns. That's what we have in this record. She had given money to him, she gets beaten and she's been with him for [one] year and he has beat her in the past. I don't know what else you need."

After Cross's trial counsel stated he disagreed with everything Kia testified to, the magistrate made an express finding Kia was a credible witness. After Osborne's trial counsel asserted Kia's testimony established Osborne acted under duress, the magistrate opined both women were under Cross's control, as demonstrated by Cross instructing them how to move from the first room to the second room.

After stating the only count it was going to hold Osborne to answer on was count 4, the magistrate ruled as follows: "[T]he reason is that's the only thing, when I am trying to compare and contrast everything, that jumps out at me at a point that I can make a reference to, that says she stepped above and beyond any kind of relationship with the male companion or male pimp and that's kind of how I am gauging it. I am trying to find things in the record that tells me she is stepping beyond or above what her situation is. [¶] And, you know, you tell me over and over again, there is not enough in the record about the relationship. Whose fault is that? I am not blaming you, but you have the burden, so put that stuff in the record then and that would tell me more that it's not a human trafficking situation to such a degree that duress as a matter of law has been demonstrated. [¶] So it's good to say all that and say that there's not that much in the record about that relationship, but I think I have a lot and like I said before, there is really not a doubt and I thought about this a lot. She is in a [10] times or more different situation, harsher situation than this victim was and when I have that as a basis of it, as a foundation, you know, this is just not right. I don't want to base decisions on my gut. I want to base it on evidence and I keep having to push that aside, that this just isn't right. [¶] We're going to potentially send someone away for life in prison on a [section] 209 when she is that entrenched as a victim of human trafficking because she walked up some stairs at the direction of a male. I mean, doesn't that give you pause, I mean, as a human being? Both of you? Something is not right and I can't do it and I looked at my record and I want you to refile, if you want, and let another court take a look at it and let's see what they think. Different people have different opinions, but this is just not there. I

can't do it and I am not going to do it. [¶] So she is discharged on every count except count 4 for the reasons stated. That remains and it remains as a felony."

The prosecution subsequently filed an information charging Osborne with all of the charges contained in the second complaint. Osborne's trial counsel did not file a section 995 motion.

B. Law & Analysis

"A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).)

In this case, Osborne argues her trial counsel should have filed a section 995 motion to set aside the information, i.e., the human trafficking, robbery, and kidnapping for robbery counts, because the magistrate did not hold her to answer on those counts. To assess the validity of her contention, we must determine the following:

whether, based on the law and the information available at the time,[6] a reasonably competent attorney would have moved to set aside those counts; and whether a successful motion would have resulted in a more favorable outcome to Osborne.

1. Deficient Performance

"In the context of a potential pretrial motion counsel has a duty to research the law, investigate the facts and make the motion in circumstances where a diligent and conscientious advocate would do so. [Citations.] This does not mean counsel has to be absolutely convinced the motion, if made, would be granted nor that the motion, if granted, would result inexorably in the defendant's acquittal. [Citations.] The motion need only be meritorious. [Citation.]"[7] (*People v. Gonzalez* (1998) 64 Cal.App.4th 432, 437-438, fn. omitted (*Gonzalez*).)

Thus, Osborne must demonstrate a section 995 motion would have been meritorious in the superior court. To provide context, we provide a brief discussion of the principles governing a magistrate's role at a preliminary hearing.

a. Magistrate's Functions

A magistrate's function at a felony preliminary hearing is to determine whether there is "sufficient cause" to believe the defendant is guilty of the charged offense. (§§ 871, 872.) "'[S]ufficient cause'" means "'reasonable and probable cause'"

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[6] Because Osborne argues a section 995 motion would have been successful, she is required to satisfy the burden she would have had in the trial court.

[7] Other than thinking a section 995 would not be meritorious, which is an insufficient ground for not bringing one, there are a couple other reasons why trial counsel would not file a section 995 motion. The first reason is counsel did not think to file one. Needless to say, that is objectively *unreasonable*. Second, counsel may have concluded a section 995 motion would alert the prosecutor to more serious crimes and cause the prosecutor to amend the information. (Cal. Criminal Law Procedure & Practice (Cont.Ed.Bar 2018) § 13.5, pp. 305-306.) Osborne was charged with four serious crimes and was facing a life sentence. Filing a section 995 motion would not place her in any more jeopardy than she already faced.

or "a state of facts as would lead a [person] of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. [Citation.]" (*People v. Uhlemann* (1973) 9 Cal.3d 662, 666-667.) To determine whether sufficient cause exists, the magistrate may "weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses. [Citation.]" (*Id*. at p. 667 [magistrate entitled to perform adjudicatory functions].) But a magistrate is not a trier of fact: "He does not decide whether defendant committed the crime, but only whether there is '"some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it."' [Citation.]" (*People v. Slaughter* (1984) 35 Cal.3d 629, 637 (*Slaughter*).)

At the conclusion of the preliminary hearing, if the magistrate finds sufficient cause to believe the defendant is guilty, the magistrate holds the defendant to answer, and the prosecution can file an information in the superior court charging any offenses named in the holding order, any transactionally related offenses shown by the evidence at the hearing, and any offenses the magistrate dismissed, unless the magistrate made factual findings. (§§ 872 [order holding to answer], 739 [information charging defendant]; *Jones v. Superior Court* (1971) 4 Cal.3d 660, 666 (*Jones*).) "A mere refusal to hold to answer does not amount to a factual determination fatal to the charge." (*People v. Superior Court (Day)* (1985) 174 Cal.App.3d 1008, 1017 (*Day*).) Section 995, subdivision (a)(2)(A), authorizes a defendant to move to set aside an information on the ground the magistrate did not legally commit the defendant.

The first step in determining whether a section 995 motion would have been meritorious is to determine whether the magistrate made a legal conclusion, as the Attorney General contends, or made findings of fact, as Osborne asserts. (*Slaughter, supra,* 35 Cal.3d at p. 638 [character of judicial review depends on whether magistrate made conclusion of law or findings of fact]; see *People v. Leon* (2015) 61 Cal.4th 569, 596 ["A magistrate's material factual findings are binding on the superior court . . .

however, the prosecution may challenge the magistrate's legal conclusion that the evidence was insufficient to show that the charged offense occurred"].)

b. Conclusion of Law or Findings of Fact?

Jones, supra, 4 Cal.3d 660, is instructive. In that case, a complaint charged petitioners with rape, oral copulation, and sodomy. (*Id*. at p. 663.) At the conclusion of the preliminary hearing, at which petitioners and the victim testified differently to the events, the magistrate found petitioners did not use force, the victim consented to intercourse, and neither oral copulation nor sodomy occurred. (*Id*. at pp. 663-664.) Specifically, the magistrate stated the following: "I believe that the girl went with them willingly for the purpose of having sexual intercourse in the mountains." (*Id*. at p. 663.) The magistrate held petitioners to answer only on the charge of statutory rape, which the prosecution did not charge but the evidence showed. (*Id*. at p. 664.) The prosecution filed an information containing only the original charges, rape, oral copulation and sodomy, and not statutory rape. (*Ibid*.) The trial court denied petitioners' section 995 motion. (*Ibid*.)

Our Supreme Court granted petitioners' writ of prohibition, finding the magistrate made "material factual findings," which negated any possible conclusion petitioners committed the charged offenses. (*Jones, supra*, 4 Cal.3d at pp. 663, 666.) The court opined the following: "[S]ince the magistrate found, as a matter of fact, that [the victim] consented to intercourse and that no acts of oral copulation or sodomy occurred, it follows that those offenses were not shown by the evidence to have been committed (. . . § 739), and should not have been included in the information." (*Jones, supra*, 4 Cal.3d at p. 666.) In doing so, the court explained "no case has ever indicated that the amendment was intended to allow the district attorney to ignore the magistrate's findings of *fact* and charge the defendant with an offense or offenses which the magistrate has *expressly* found never took place." (*Id*. at p. 666, second italics added; *Slaughter, supra*, 35 Cal.3d at p. 638 [reviewing court cannot assume magistrate made

findings of fact]; *Day, supra*, 174 Cal.App.3d at pp. 1017-1018 [questioning whether implied findings of fact permitted under *Jones* and condemning "guesswork" to determine what the magistrate found].) The court indicated, however, that when a magistrate makes a legal conclusion "the evidence failed to show probable cause that the offense had been committed[,]" such a conclusion can be challenged by including additional charges in the information, so long as that challenge is made "within the context of the magistrate's findings on the evidence." (*Slaughter, supra,* 35 Cal.3d at pp. 665-666.)

In *Day, supra*, 174 Cal.App.3d at pages 1015-1016, the court explained that because the *Jones* court did not provide guidelines for determining whether the magistrate made a legal conclusion or findings of fact, courts have had difficulty applying the test. The *Day* court stated the following: "*Jones'* distinction between a factual finding and a legal conclusion is clear enough in the abstract, but has posed some difficulty in its practical implementation. Experience has demonstrated that it is not always easy to apply a strip of appellate litmus to a magistrate's record remarks and distinguish between evidentiary evaluation and factual determination." (*Day, supra*, 174 Cal.App.3d at pp. 1015-1016.) The *Day* court attempted to provide some guidelines, finding the following are legal conclusions: "that the evidence is 'too weak' [citation]; that the [prosecution] failed to prove malice [citation]; and of course the explicit phraseology that the evidence is 'insufficient.'" (*Id*. at p. 1019, fn. 5.) Reviewing courts focus on the magistrate's specific language to distinguish between factual findings as opposed to legal conclusions of insufficient evidence and not to the magistrate's labels. (*Id*. at p. 1016.)

In *People v. Bautista* (2014) 223 Cal.App.4th 1096, 1100-1101, another panel of this court summarized the distinction: "'In summary, cases arising under section 739 recognize a clear distinction: findings of fact must be sustained if supported by substantial evidence, *but a finding of lack of probable cause, unsupported by any factual*

findings, is reviewed as an issue of law. Absent controlling factual findings, if the magistrate dismisses a charge when the evidence provides a rational ground for believing that defendant is guilty of the offense, his ruling is erroneous *as a matter of law*, and will not be sustained by the reviewing court.' [Citation.]"

Similar to *Jones, supra*, 4 Cal.3d at pages 663 and 666, where our Supreme Court concluded the magistrate made a factual finding the victim consented to the charged crimes, here the magistrate made a factual finding Osborne did not willingly participate in the discharged crimes. At the outset, the magistrate made the "factual finding" Osborne was a human trafficking victim. The magistrate added Cross trafficked Osborne for one year and inflicted violence on her to the extent she was "under duress, under coercion, under violence[.]" Relying on Logan's testimony that pimp's exert control over prostitutes to recruit other prostitutes and evidence Cross assaulted Osborne and Osborne gave Cross money, the court questioned how the prosecutor could assert Osborne aided and abetted a robbery under those circumstances. The magistrate also relied on the fact Cross exerted physical control over Osborne when he directed her, and Kia, from the first floor to the second floor. The magistrate also expressly found Kia was a credible witness. In discharging her on the human trafficking, robbery, and kidnapping for robbery counts, the magistrate found Osborne was the victim of "a human trafficking situation to such a degree that duress as a matter of law has been demonstrated." These factual findings were fatal to the charged offenses of human trafficking, robbery, and kidnapping to commit robbery because they inexorably led to the express factual finding Osborne acted under duress. In so doing, the magistrate found Osborne did not act voluntarily and aid and abet Cross in committing the three offenses.

The Attorney General contends the magistrate did not make an express factual finding Osborne acted under duress. He relies on the magistrate's statements "so put that stuff in the record then and that would tell me more that it's not a human trafficking situation to such a degree that duress as a *matter of law* has been

demonstrated[]" (italics added) and the prosecution should refile for the superior court to review.

We admit the magistrate ambiguously used the word "matter of law" here and suggested the prosecution could refile. Although this comment could implicitly support the finding he made a conclusion of law, the magistrate's statements, when read in their entirety, support the conclusion he made an express factual finding Osborne did not act voluntarily. This was a factual determination and not an evidentiary evaluation.

The Attorney General relies on *Dudley v. Superior Court* (1974) 36 Cal.App.3d 977 (*Dudley*), and *People v. Farley* (1971) 19 Cal.App.3d 215 (*Farley*), to argue the magistrate made a conclusion of law and not findings of fact. The Attorney General's reliance on *Dudley* and *Farley* is misplaced.

In *Dudley, supra,* 36 Cal.App.3d at page 980, a complaint charged petitioner with murder, and after the preliminary hearing, the magistrate reduced the charge to involuntary manslaughter. In ruling, the magistrate stated the following: "'I think it is a one-sided fight. I think he took advantage when [the victim] was down, but I do not believe that those circumstances in the light of the autopsy surgeon's findings that they were moderate external injuries and do not show abandon and malignant heart.'" (*Ibid*.) The *Dudley* court distinguished *Jones, supra,* 4 Cal.3d 660, and opined the magistrate made "remarks leav[ing] considerable room for interpretation." (*Dudley, supra,* 36 Cal.App.3d at p. 981.) The *Dudley* court reasoned, "The unimpeached, credible evidence received at the preliminary examination supports an inference of malice and gives probable cause to try petitioner for murder, but the magistrate acted upon his personal opinion that the offense was no more than manslaughter." (*Id*. at p. 985.) The court concluded the magistrate's finding petitioner acted "without malice" was not a factual finding and the prosecution was entitled to charge petitioner with murder. (*Ibid*.)

Unlike in *Dudley*, here the magistrate's remarks do not leave considerable room for interpretation. Aside from the magistrate's statements above regarding "duress as a matter of law" and refiling, the magistrate expressly, clearly, and unambiguously found Cross inflicted violence on Osborne to the point Osborne did not act willingly but acted under duress.

In *Farley, supra,* 19 Cal.App.3d at page 219, a complaint charged defendant with multiple counts of sale of marijuana and LSD. After the preliminary hearing, the magistrate dismissed two counts charging sale of marijuana and LSD. In ruling, the magistrate stated, "'after the hearsay is stricken, the evidence that goes to those is insufficient[.]'" (*Ibid*.) The prosecution, however, included those counts in the information. (*Id*. at p. 220.) The *Farley* court explained "the magistrate did not make factual findings" and held its ruling finding lack of probable cause was in error. (*Id*. at p. 221.) The *Farley* court concluded that because the magistrate did not make factual findings, it was entitled to review the preliminary hearing transcript and conclude the magistrate erred in finding a lack of reasonable and probable cause to show the disputed offenses had been committed. (*Id*. at pp. 221-222.)

Here, unlike in *Farley*, the magistrate did not merely find the prosecution failed to demonstrate reasonable cause the offenses had been committed. As we explain above, the magistrate made numerous factual findings leading to an express factual finding Osborne acted under duress. Thus, because we conclude the magistrate made express findings of fact, we must now address the next issue, how the superior court would have reviewed the magistrate's ruling had Osborne's trial counsel filed a section 995 motion. This was not a mere refusal to hold the defendant to answer.

c. Duress

(1) Law of Duress

"'The defense of duress is available to defendants who commit crimes, except murder, "under threats or menaces sufficient to show that they had reasonable

cause to and did believe their lives would be endangered if they refused.'" [Citation.] 'Because the defense of duress requires a reasonable belief that threats to the defendant's life . . . are both imminent and immediate at the time the crime is committed [citations], threats of future danger are inadequate to support the defense.' [Citations.]" (*People v. Casares* (2016) 62 Cal.4th 808, 844.) "An essential component of this defense is that the defendant be faced with a direct or implied demand that he or she commit the charged crime." (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 567.)

(2) Evidence of Duress

Here, based on Kia's and Logan's testimony at the preliminary hearing, there was ample evidence Osborne acted under duress, i.e., she did not willfully and voluntarily aid and abet the human trafficking, robbery, and kidnapping for robbery offenses because Cross exercised dominion and control over her. Kia testified she saw Cross punch Osborne's face with a closed fist, and Osborne told Kia that Cross beat her occasionally. Kia explained the only thing she saw Osborne do to make money was to work as a prostitute, and she saw Osborne give Cross her earnings. Kia explained Cross's behavior demonstrated he was a "gorilla pimp," a pimp who beats on his prostitutes to control them, and Kia was afraid of him; he elbowed her face. Kia also testified Osborne asked her to work as a prostitute for Cross and said to her, "'[I]f I get in trouble because of you, I [am] going to beat your ass.'" Additionally, when Kia asked Osborne if she could go to work with her, Osborne said it was up to Cross. Finally, based on Logan's testimony it was reasonable to infer Osborne worked as a prostitute under Cross's control for about one year and Osborne tried to recruit Kia to work for Cross.

This evidence demonstrated Osborne was a victim of human trafficking and she did not willfully and voluntarily aid and abet the human trafficking, robbery, and kidnapping for robbery of Kia but rather was faced with Cross's demand she commit these acts. Contrary to the Attorney General's assertion otherwise, evidence Cross repeatedly used violence against Osborne during the course of the pimp-prostitute

relationship supported the court's express factual finding Osborne was under a constant threat of imminent violence. Based on all this evidence, it was reasonable to conclude a prostitute who was beaten on various occasions over the course of one year by her pimp would reasonably fear imminent beating at his hands and accede to his demands.

Competent counsel would have researched the law and reviewed the record, i.e., the preliminary hearing transcript, and concluded a section 995 was appropriate and likely meritorious. Here, trial counsel failed to perform these duties and fell below that level of competence. We must now address whether Osborne was prejudiced by her trial counsel's deficient performance.

2. Prejudice

"To establish prejudice, . . . the defendant must do more than show the motion would have been meritorious. When the alleged deficiency is the failure to make a [pretrial] motion, the defendant must show . . . the motion would have been successful. [Citation.]" (*Gonzalez, supra,* 64 Cal.App.4th at p. 438.) To determine whether a section 995 motion would have been successful in the superior court, we must apply the evidence of duress detailed above to the applicable standard of review. But that does not end our inquiry. Even if a section 995 motion would have been successful, which would terminate the criminal action (Cal. Criminal Law Procedure & Practice (Cont.Ed.Bar 2018) § 13.31, p. 322), section 1387 authorizes the prosecution to recharge offenses subject to certain requirements and exceptions (§ 999; *Ervin v. Superior Court* (1981) 119 Cal.App.3d 78, 85 [section 999's purpose to state section 995 not bar to further prosecution]). To determine whether there is a reasonable probability the outcome of the proceeding would have been different, we must address whether the prosecution could refile the charges. First we will address section 995 and then section 1387 et seq.

a. Section 995

(1) Standard of Review in Superior Court

"In a proceeding under section 995, the superior court's role is similar to that of an appellate court reviewing the sufficiency of the evidence to sustain a judgment. [Citations.] The superior court merely reviews the evidence; it does not substitute its judgment on the weight of the evidence nor does it resolve factual conflicts. [Citation.]" (*People v. McDonald* (2006) 137 Cal.App.4th 521, 529 (*McDonald*).)

(2) Application to Facts

As we explain above, Kia's and Logan's testimony at the preliminary hearing provided substantial evidence Osborne did not willfully and voluntarily aid and abet the human trafficking, robbery, and kidnapping for robbery offenses against Kia. Their testimony established Cross and Osborne had a pimp-prostitute relationship for at least a year, Cross beat Osborne, and that after working as a prostitute, Osborne gave Cross her earnings. Therefore, substantial evidence supported the magistrate's express finding of fact Osborne did not act willfully and voluntarily but instead acted under duress. Because the superior court could only review the evidence, i.e., the facts the magistrate found, and could not substitute its judgment for the magistrate's, we conclude it is reasonably probable the superior court would have granted the section 995 motion. Thus, we conclude that had Osborne's trial counsel filed a section 995 motion to set aside the human trafficking, robbery, and kidnapping for robbery counts, it would have been successful. We must now address section 1387.

b. Section 1387

Section 1387 "sets forth what is sometimes referred to as the 'two-dismissal rule': Two dismissals of a felony action bars further prosecution, except in certain

specified circumstances."[8] (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 739 (*Miller*).) However, "[s]ection 1387.1 carves out an exception to the two-dismissal rule when the action involves a 'violent felony,' as defined in section 667.5. Under section 1387.1, a third filing is permitted where (1) either of the prior dismissals was 'due solely to excusable neglect,' and (2) the conduct of the prosecution did not 'amount[] to bad faith.'" (*Miller, supra*, 101 Cal.App.4th at p. 739.)

Here, the first dismissal for purposes of section 1387 occurred on March 1, 2016, when the case was not brought to trial within the statutory time (§ 1382). The parties agree that a dismissal following a successful section 995 motion constitutes a dismissal for purposes of section 1387. (*Ziesmer v. Superior Court* (2003) 107 Cal.App.4th 360, 366.) Thus, the human trafficking, robbery, and kidnapping for robbery offenses would have been twice dismissed following a successful section 995 motion. We must examine each of the offenses individually to determine whether the prosecution could refile them. (*People v. Mason* (2006) 140 Cal.App.4th 1190, 1197 (*Mason*).)

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[8] Section 1387, subdivision (a), provides in part as follows: "An order terminating an action pursuant to this chapter, or [s]ection 859b, 861, 871, or 995, is a bar to any other prosecution for the same offense if it is a felony . . . and the action has been previously terminated pursuant to this chapter, or [s]ection 859b, 861, 871, or 995," except "where subsequent to the dismissal of the felony . . . the judge or magistrate finds any of the following: [¶] (1) That substantial new evidence has been discovered by the prosecution which would not have been known through the exercise of due diligence at, or prior to, the time of termination of the action. [¶] (2) That the termination of the action was the result of the direct intimidation of a material witness, as shown by a preponderance of the evidence. [¶] (3) That the termination of the action was the result of the failure to appear by the complaining witness, who had been personally subpoenaed. . . . [¶] (4) That the termination of the action was the result of the complaining witness being found in contempt of court . . . ."

(1) Count 1-Human Trafficking

Osborne argues, and the Attorney General concedes, the prosecution could not refile the human trafficking offense. As we explain above, two dismissals pursuant to section 1387 bars further prosecution of an offense unless the offense is a violent felony pursuant to sections 1387.1 and 667.5. Human trafficking, section 236.1, subdivision (b), is not a violent felony listed in section 667.5. Thus, this offense was twice dismissed and could not be refiled because it was a non-violent felony. This is an obvious favorable outcome. There is a reasonable probability the outcome of the proceeding would have been different on the human trafficking offense.

(2) Count 2-Robbery & Count 6-Kidnapping for Robbery

Osborne argues the magistrate would not have permitted a third filing of the robbery and kidnapping for robbery offenses because there was no evidence of excusable neglect. We agree.

As we explain above, section 1387.1, subdivision (a), allows the prosecution a third chance to "'refile charges'" where a prior dismissal of a violent felony "'offense'" was due solely to excusable neglect and the prosecution did not act in bad faith. (*People v. Woods* (1993) 12 Cal.App.4th 1139, 1156.) Robbery (§§ 211, 212.5, subd. (a)), and kidnapping for robbery (§ 209), are violent offenses for purposes of section 667.5 (§ 667.5, subd. (c)(9), (14); *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, 1118 [kidnapping and kidnapping for robbery same offense for purposes of section 1387]).

Section 1387.1, subdivision (b), states, "As used in this section, 'excusable neglect' includes, but is not limited to, error on the part of the court, prosecution, law enforcement agency, or witnesses." It is defined as "'"'"'"'"neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances."' [Citation.]" [Citation.]'" (*Mason, supra,* 140 Cal.App.4th at p. 1196.)

We recognize it is particularly difficult to establish ineffective assistance of counsel on direct appeal where we are limited to evaluating the appellate record (*Mai, supra,* 57 Cal.4th at p. 1009). However, we conclude Osborne demonstrated there was a reasonable probability the outcome of the proceeding would have been different on the robbery and kidnapping for robbery offenses had the superior court granted a section 995 motion.

On the date set for jury trial, the prosecution first indicated Osborne's trial counsel was not present because he was in trial. Although Osborne was a "no statutory time waiver" and March 1, 2016, was the last day for trial, Osborne's trial counsel's absence because he was in another trial was good cause to continue the matter. (*People v. Sutton* (2010) 48 Cal.4th 533, 556-557 [engagement of counsel in another trial was good cause to continue matter beyond 60-day period].) However, inexplicably the prosecutor then stated he was unable to proceed, offering no explanation. Contrary to the Attorney General's claims otherwise, because the prosecutor could have obtained a continuance for good cause based on Osborne's trial counsel's absence. Instead, he represented he was unable to proceed without any explanation. Osborne has demonstrated a lack of excusable neglect. It is reasonably probable Osborne would have prevailed in her opposition to a third filing based on a lack of excusable neglect.

Additionally, even had the magistrate permitted a third filing pursuant to section 1387, there was a reasonable probability the outcome of the proceeding would have been different on the robbery and kidnapping for robbery offenses.

A defendant may challenge the improper recharging of a felony under sections 1387 by moving to dismiss the complaint at the preliminary hearing. (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 740.) A section 1387 motion may be heard in conjunction with the preliminary hearing. (*Ibid*.)

Even had the magistrate disagreed with Osborne's contention and permitted a third filing, and the matter proceeded to a preliminary hearing, it is reasonably probable

the magistrate would not have held Osborne to answer on those two offenses based on the substantial evidence detailed above that Osborne acted under duress. The evidence would be the same in a third preliminary hearing and it is reasonably probable the magistrate would have made the same factual findings.

The Attorney General states that had Osborne filed a section 995 motion and the trial court granted that motion, the prosecution could have appealed (§ 1238). That is correct. But this court would have reviewed the trial court's grant of a section 995 motion under the same standard the superior court reviews such a ruling—for substantial evidence.

"On appeal from a section 995 review of the denial of a defendant's motion to suppress, we review the determination of the magistrate at the preliminary hearing. [Citations.] We must draw all presumptions in favor of the magistrate's factual determinations, and we must uphold the magistrate's express or implied findings if they are supported by substantial evidence. [Citations.]" (*McDonald, supra,* 137 Cal.App.4th at p. 529.) Based on the record before us, we too would affirm based on the substantial evidence of duress presented at the preliminary hearing.

Thus, Osborne's trial counsel provided deficient performance and there was a reasonable probability the outcome of the proceeding would have been different on the human trafficking, robbery, and kidnapping for robbery counts. Because we conclude Osborne received ineffective assistance of counsel and we must reverse those three convictions, we need not address her claim the prosecutor committed prejudicial error, or that counsel was ineffective for failing to object to that error.

II. Section 654

Relying on section 654, Cross contends the trial court erred when it failed to stay the sentence on count 2 (first degree robbery) because that offense, as well as counts 3 (assault with great bodily injury) and 6 (kidnapping to commit robbery), were committed to further count 1, human trafficking, a continuing offense. Because the court

imposed and stayed the sentences on counts 1 and 3, Cross asserts he could only be punished once, for count 6, which carries a greater penalty than count 2, and thus the court should have stayed the sentence on count 2. We disagree.

Section 654, subdivision (a), provides in relevant part as follows: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Simply stated, "section 654 is applicable where there is a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of section 654. The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one. [Citations.]" (*People v. Bauer* (1969) 1 Cal.3d 368, 376.) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he [or she] may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Perez* (1979) 23 Cal.3d 545, 551.)

"If the court makes no express findings on the issue, as happened here, a finding that the crimes were divisible is implicit in the judgment and must be upheld if supported by substantial evidence. [Citation.] Thus, '[w]e review the trial court's findings "in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]"' [Citation.]" (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717.)

Human trafficking depends on a "deprivation of liberty" of the victim, including a restriction of liberty accomplished through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to effect pimping, pandering, or

procuring. (§ 236.1, subds. (b) & (h)(3).) Pimping and pandering are continuous offenses. (*People v. Dell* (1991) 232 Cal.App.3d 248, 265-266.)

Relying on the fact pimping and pandering are continuous offenses, Cross asserts human trafficking done for the purpose of pimping and pandering is a continuous offense and thus he engaged in a single course of conduct for the purpose of coercing Kia into pimping and pandering. He relies on Barragan's testimony pimps use violence to control prostitutes and "break" prostitutes, by for example robbing and kidnapping them, to coerce them into prostitution. The standard of review requires us to affirm the trial court's implicit findings Cross harbored multiple criminal objectives in committing counts 2 and 6.

As to count 2, robbery, the basis of this count was Cross taking Kia's cell phone and the money from her boot when she entered the room on the first day of the three-day ordeal. This evidence supports the court's implicit finding Cross's intent to rob her immediately upon entering the room was separate from his intent to commit human trafficking.

With respect to count 6, kidnapping for robbery, the basis of this count was moving Kia from the first floor motel room to the second floor motel room to rob her either by forcing her to withdraw money using her bank card or committing prostitution. After Cross moved Kia to the second floor motel room, he embarked on a plan to use her bank card to withdraw money from her account but failed when she did not have her identification. Although there was evidence demonstrating Cross wanted Kia to work as a prostitute for him and the prosecutor argued that to the jury, the prosecution did not charge Cross with pimping and pandering, or attempting to pimp and pander Kia. Thus, this evidence supports the court's implicit finding Cross's intent to kidnap to rob her was separate from his intent to commit human trafficking.

Cross relies on *People v. Mejia* (2017) 9 Cal.App.5th 1036 (*Mejia*), to support his claim human trafficking is an "'umbrella'" crime under which other crimes may be committed but not separately punished. *Mejia* is inapposite.

In *Mejia*, a jury convicted defendant of spousal rape, infliction of corporal injury on a spouse, criminal threats, and torture. (*Mejia, supra,* 9 Cal.App.5th at p. 1039.) The *Mejia* court addressed the issue of whether defendant's acts of spousal rape, infliction of corporal injury on a spouse, and criminal threats were included among the acts underlying the torture count. (*Id*. at pp. 1045-1046.) The court concluded section 654 required a stay of the sentences imposed for the spousal rape and infliction of corporal injury on a spouse because both offenses "were included among the acts underlying the torture count and were essential to satisfying an element of that offense[.]" (*Id*. at p. 1046.) The court stated the criminal threat count was subject to a different analysis, however, because criminal "threats are neither necessary to the commission of torture nor sufficient to satisfy any of its elements." (*Ibid*.) Because substantial evidence supported the trial court's implied conclusion the threats were not part of an indivisible course of conduct, the *Mejia* court concluded section 654 did not apply to that count. (*Mejia, supra,* 9 Cal.App.5th at pp. 1046-1047.)

Mejia is inapposite because here neither the robbery nor the kidnapping to commit robbery were essential to establishing the human trafficking offense. The charges that would have been essential, pimping and pandering, were not charged against Cross vis-à-vis Kia. And as we explain above, substantial evidence supported the trial court's implied finding counts 2 and 6 were separate and apart from count 1. Thus, the court did not err by failing to stay the sentence on count 2.

DISPOSITION

We affirm Cross's judgment. We reverse Osborne's convictions for human trafficking, robbery, and kidnapping for robbery. We affirm her conviction for assault with great bodily injury.

Pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), the clerk of this court is directed to forward to the State Bar a copy of this opinion upon issuance of the remittitur. The clerk shall also notify defense counsel, Gilbert Paul Carreon, that he has been referred to the State Bar. (§ 6086.7, subd. (b).) We express no view on whether a State Bar disciplinary action is warranted.

O'LEARY, P. J.

WE CONCUR:

THOMPSON, J.

GOETHALS, J.